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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 650

LESTER ROTHSCHILD, individually and trading as GEN-O-PAK COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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The Scheffer Press, Inc.—ANdover 3-6850

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Lester Rothschild, individually and trading as Gen-O-Pak Company, prays that the writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decree of that court rendered on December 9, 1952 (R. 163). A transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in compliance with Rule 38 of the Rules of this Court.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

This action arises on appeal from an order of the Federal Trade Commission requiring the Petitioner to

cease and desist from certain acts and practices in interstate commerce which the Commission has ruled to be unfair and deceptive. Complaint was filed by the Commission against Petitioner, charging that the Petitioner's manner of conducting his business constituted unfair and deceptive acts and practices in interstate commerce. A hearing was had on the charges, and the Commission entered a cease and desist order (R. 112, 135, 148).

An appeal was duly prosecuted to the United States Court of Appeals for the Seventh Circuit, in which court the determination of the Commission was affirmed (R. 156).

Both the Commission and the Court of Appeals failed to recognize the jurisdictional limitations imposed upon the Federal Trade Commission by the Congress and the Judiciary. The matters complained of by the Commission are not matters involving interstate commerce, except that they involve the use of the United States postal facilities in the transmission and receipt of mail by the Petitioner. As to such matters, it is the Petitioner's contention (a) that they do not constitute interstate commerce within the meaning and intendment of the Federal Trade Commission Act (52 Stat. 111-112; 15 U.S.C., Section 45(A)), and (b) that such acts and practices as Petitioner has engaged in in the conduct of his business, if subject to Federal regulations at all is subject to such regulation by the United States Postal Department, and not by the Federal Trade Commission.

There is further involved in this matter the serious question of whether the acts and practices complained of by the Commission are, in fact, unfair and deceptive, and whether such acts and practices may be restricted or forbidden by any Federal agency.

A complete statement of the specific facts involved in this case are contained in the brief filed in support of this petition for writ of certiorari, which brief is annexed to this petition.

JURISDICTION.

The jurisdiction of this Court arises under Title 28 United States Code, Section 1254. The opinion of the Court of Appeals for the Seventh Circuit was entered on November 20, 1952 (Rec. 156) and the Final Decree Affirming and Enforcing the Order to Cease and Desist, which Petitioner seeks to have reviewed, was entered pursuant to said Opinion on December 9, 1952 (Rec. 163).

THE QUESTIONS PRESENTED.

1. Is one who seeks information through exclusive use of the United States Mail engaged in interstate commerce so as to come within the jurisdiction of the Federal Trade Commission?

2. Whether the acts and practices by Petitioner were of such a nature as to constitute them unfair and deceptive within the meaning of the Federal Trade Commission Act?

3. Whether the Order to Cease and Desist is too broad in scope and not within the jurisdiction of the Federal Trade Commission to enter and enforce?

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The discretionary power of this Court is invoked upon the following grounds:

1. The decision of the Court of Appeals for the Seventh Circuit in holding that Petitioner was engaged in interstate commerce is contrary to the weight of authority on the subject.

2. The decision of the Court of Appeals for the Seventh Circuit in holding that the acts and practices complained of were deceptive within the meaning of the Federal Trade Commission Act is contrary to the weight of reason and authority.
3. The scope of the order of the Federal Trade Commission to Cease and Desist exceeds the authority and power conferred upon it by the Congress in the Federal Trade Commission Act and the decision of the Court of Appeals for the Seventh Circuit in ordering the enforcement of said order is in conflict with the intent of the Congress as expressed in said Act.

Wherefore, your Petitioner respectfully prays that the writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings in the United States Court of Appeals for the Seventh Circuit had in this cause, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed and that Petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

SAMUEL E. HIRSCH,
Attorney for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS OF THE COURTS BELOW.

The Initial Decision of the Trial Examiner of the Federal Trade Commission, which was approved and adopted by the Commission, appears in the record at page 102.

The Opinion of the Court of Appeals for the Seventh Circuit appears at page 156 of the record, and the Final Decree entered in pursuance of the said Opinion appears on page 163 of the record.

II. JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Sec. 1254. The Opinion of the Court of Appeals was entered and filed on November 20, 1952, and the Final

Decree of the Court of Appeals was entered and filed on December 9, 1952. No motion for rehearing was made.

III. STATEMENT OF THE CASE.

Petitioner is an individual who does business in Chicago, Illinois under the trade names of Gen-O-Pak Company, American Deposit System and Manpower Classification Bureau, (R. 31-32).

Petitioner, operating as Gen-O-Pak Company, sells to his customers two forms of double post-cards. One form of double post-card reads as follows:

OFFICE OF THE GEN-O-PAK CO.
139 North Clark Bldg.
Chicago 2, Illinois

DEAR FRIEND: We have on hand a package, which we will send to you if you will completely fill out the return card, giving sufficient identification to warrant our sending this package to you. We will hold same at your risk subject to your forwarding directions for thirty days and the complete information requested. There are no charges whatsoever and the package will be sent to you all charges prepaid.

Yours very truly,
THE GEN-O-PAK CO.

The return card attached to the above card reads:

MAIL THIS CARD TO US AT ONCE

OFFICE OF THE GEN-O-PAK CO.
139 North Clark Bldg.
Chicago 2, Illinois

Package Identification Number..... Checked.....
Dept. Unidentified.....
Charges..... No Charges.....

Please send package (fully prepaid) to me. My correct address and identification are as follows:

SEND THE ABOVE PACKAGE TO

Print correct name.....

Print correct address.....

Print city..... State.....

Party must be identified.

For identification I refer you to my employer, my bank, and friend.

Bank .....

Address ..... City .....

Employer .....

Address ..... City .....

Department ..... Check No.....

Friend .....

Address ..... City .....

ALL questions must be answered, or package will not be sent.

General description of myself

Color hair..... Color eyes.....

Height..... Weight..... Age.....

If married, mate's first name.....

NO POSTAGE OR ADDRESSING NECESSARY

Copyrighted 1950 by Gen-O-Pak Co.

(R. 61-62)

The second type of double post-card used is similar to the first except that it states that Gen-O-Pak Company has a package that it wishes to deliver to the person whose name and last known address appears on the attached postcard. The card requests the addressee to give the correct address of the person named so as to enable petitioner to effect delivery (R. 63-64).

These cards are sold to petitioner's customers, who in turn address them and return them to him. Petitioner then mails them to the addressees from his office in Chicago

and awaits the responses on the reply post-cards. When the reply cards are returned, he forwards them to his customers. (R. 33-34).

To those persons who return the reply cards petitioner sends three pen points having a value of from 3¢ to 6¢, and also certain advertising literature for the sale of office supplies, together with an order blank, (R. 34-35). In the year 1950 petitioner sold 44,253 post cards (identified as Commission's Exhibit No. 1, R. 61) at a gross price of $7,080.48 and sold 8,510 post cards (identified as Commission's Exhibit No. 2, R. 63) at a gross price of $936.10. In the same year petitioner received 565 orders for office merchandise totalling $639.96.

The American Deposit System is a company operated by petitioner which sells to its customers certain form letters which request the answers to certain questions regarding identification of the individuals to whom these letters are addressed. These letters are placed in envelopes addressed by petitioner's customers and are then returned to the petitioner who mails them to the addressees. (R. 42-43, 77-78). In 1950, 28,486 of these letters were sold at a value of $4,557.76. If the letters are returned by the addressees with the information therein requested, petitioner sends them three pennies and forwards the letters of information to his customers (R. 46).

Insofar as the Manpower Classification Bureau is concerned, the letters requesting information (R. 85) are sent to petitioner's customers who place them in envelopes and address them to the persons to whom they wish them sent. The letters and envelopes are then returned to petitioner who mails them to the addressees. When the letters are returned to petitioner, he copies the pertinent information therein contained, tabulates them in his files,

and sends the letters back to his customers for whatever purpose they wish to make of them (R. 47, 48). The information listed on the Manpower Classification Bureau forms is constantly being accumulated but has not as yet been sold to anyone, and no attempt has ever been made to do so.

Petitioner's principal business is the operation of a collection agency under the name "All States Credits Adjustment Company". None of the forms above referred to is used in connection with his main business.

IV. SPECIFICATION OF ERRORS.

1. The Court of Appeals for the Seventh Circuit erred in holding that the petitioner was engaged in interstate commerce so as to come within the jurisdiction of the Federal Trade Commission.

2. The Court of Appeals erred in holding that the acts and practices engaged in by the petitioner were and are unfair and deceptive within the meaning of the Federal Trade Commission Act.

3. The Court of Appeals erred in affirming and enforcing the order to cease and desist entered by the Federal Trade Commission for in that said order is beyond the jurisdiction and authority of the Federal Trade Commission to enter and enforce.

ARGUMENT.

I.

The Commission does not have jurisdiction of the subject matter hereof for in that

(a) The plaintiff is not engaged in interstate commerce within the meaning of that term as defined in the Federal Trade Commission Act, and

(b) No act of unfairness or deception was established or proved by the Commission.

(a)

The Federal Trade Commission Act (15 U.S.C.A. Par. 41, *et seq.*) provides in Section 4(b) thereof that:

> "Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce * * * it shall issue and serve upon such person * * * a complaint stating its charges in that respect * * *" (15 U.S.C.A. Par. 45(b))

The term "commerce" is defined as commerce among the several states, or with foreign nations.

Petitioner's business consists of the sale of certain form post cards and letters to his customers for their use, and for such purpose as they see fit.

After these cards have been sold and delivered to his customers, Petitioner's only further connection therewith is to mail them after they have been addressed by his customers and forward to them any replies which he may receive from the addressees. This service which is rendered by petitioner to his customers does not constitute

the use of an unfair or deceptive act or practice in commerce.

Nothing passes between the states except a post card or a letter, and the mere forwarding of a request for information through the mail does not constitute commerce within the meaning of the Act. See *Federal Trade Commission* v. *Smith*, 1 F. Supp. 247 (1932), and cases therein cited.

In the *Smith* case, one of the issues was whether the respondent's employer was engaged in interstate commerce within the meaning of the Federal Trade Commission Act. Respondent was employed by a corporation which rendered certain engineering, financial and advisory services of a technical and specialized nature, to certain groups of public utilities. The Court held (page 250):

> "From what has been made to appear to the Court, it is plain that the services performed by respondent on behalf of the holding and subsidiary operating companies, and which, broadly speaking, relate to legal, engineering, secretarial, fiscal, investigatory and general advisory matters, are not such as will here avail the petitioner. Without analysing the services rendered by respondent within the foregoing classifications, I will content myself by concluding that they have to do with activities which, under authoritative decisions, are not recognized as constituting interstate commerce."

The object of the Federal Trade Commission Act is to protect a vendee against fraudulent or deceptive practices of the vendor in interstate commerce. The vendees of petitioner are in no manner deceived as to the nature of petitioner's cards and service whatsoever.

A vendor of products who misrepresents them to the public by false advertising is undoubtedly responsible for those deceptive acts, but the advertising agency, printer

or the clerical help that aid in the composition of the advertising matter, it is equally clear, are not intended to be covered by the Act. If the Act were construed so as to permit the issuance of cease and desist orders against all persons who supply the vendor with any material that may be incorporated or used in vendor's deceptive acts, the result would be the extension of the Commission's authority into practically every aspect of interstate commerce and would, in addition, place upon every person dealing with another the responsibility of seeing to it that the articles or information sold by them would not be used in contravention of the law.

All that petitioner sells is a service to his customers who are the ones who cause the post cards to be sent to the persons with whom they have had business. The petitioner is not engaged directly or indirectly in selling any product to anyone, except to his customers who are principally department stores.

It is true that petitioner solicits the addressees of his customers for the sale of pencil sharpeners and other office supplies but such acts have not been complained of by the Commission.

(b)

The case upon which the Commission and the Court of Appeals laid particular emphasis is that of *Silverman* v. *Federal Trade Commission,* 145 F. 2d 751 (1944). In that case, Silverman, operating as Commercial Pen Co., sent post cards to delinquent debtors as follows:

> "We have on hand a Prepaid Package for a party whose name appears on the reverse side of this card. Due to change or error of address and lack of identification, we cannot make delivery."

A second card stated:

> "To introduce our pens, we will mail you one of them absolutely free of charge, provided you will show it to your friends and fellow employees where you work. In order to avoid duplication, name of employer must be given. You must act promptly as only a limited number of pens will be distributed in this manner. This will be sent as soon as this request card is returned."

The Court held that the contents of both cards being factually untrue, together with the use by Silverman of the name Commercial Pen Co., which was obviously a misrepresentation of the nature of his business, were intended to deceive the recipient of the post cards, all of which constituted a swindle upon said recipients.

The case at bar presents an altogether different situation. The names under which the petitioner does business do not and cannot tend to deceive or misrepresent the nature of his business. The case before the Court may be further distinguished upon the ground that every statement made by the petitioner is factually true and correct. The theory of the Court of Appeals in this case seems to be that statements which are factually true can be the basis of a charge of deception and unfairness. No court has ever gone so far as to uphold such a theory, and it would be unique indeed in American jurisprudence if such a theory were to gain favor and support at this time.

The only basis of the Commission's action herein is that the post cards are used in interstate commerce. The fact is, however, the only transactions crossing state borders occur through the use of the United States Mails. This being so, it is entirely within the province of the Post Office Department to investigate such acts and upon proper hearing and proof thereof, deny to petitioner the use of the mails; all of which is adequately provided for in the United States Postal Regulations.

It is significant that in the instant case, although the petitioner has been engaged in this business for approximately four years and has mailed many thousands of the post cards and letters about which the Federal Trade Commission complains, the Commission was unable to furnish a single witness to state that he had actually been deceived by the acts of the petitioner. Notwithstanding this lack of evidence, the Commission and Court of Appeals substituted their judgment for the actual fact and concluded that the practices of the petitioner did tend to deceive, whereas in fact no actual deception was or could be demonstrated.

II.

The order of the Federal Trade Commission to cease and desist (R. 148) which was affirmed by the Court of Appeals requires the petitioner to refrain from:

> "Using, or placing in the hands of others for use, any stationery, in connection with the locating of delinquent debtors or the collection of money due by a delinquent debtor, containing respondent's name, or any trade name used by him unless the words 'collection service' appear immediately in connection with or in conjunction therewith in type of like or equal size."

This restriction is so broad as to require the use of words "collection service" even though it would appear from the contents of the stationery used that the obvious purpose was to locate a delinquent debtor and effect collection of a debt. The Federal Trade Commission may not impose any greater restriction on the petitioner in the conduct of his business than is or may be imposed upon any other business of like kind and nature. To require the petitioner to use the words, "collection service" even though there are and could be no contention of deception or fraud is beyond the powers of the Commission.

Title 15 U.S.C. Sec. 45 (b) provides in part that:

> "If upon such hearing the Commission shall be of the opinion that the method of competition or the act or the practice in question is prohibited by * * * this title, it shall make a report in writing * * *and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice."

Under the foregoing authority, the Commission may only require the petitioner to cease and desist from the practices about which it filed a complaint. There is nothing in the Act which authorizes the Commission to require any person to do any affirmative act, such as using the words, "collection service" on his stationery. The Commission is limited to the prevention of unfair methods of competition and the use of fraudulent acts and practices in commerce. It may not affirmatively prescribe the method of operating a business which is exactly what it seeks to do in this particular case.

CONCLUSION.

This Court is respectfully requested to issue its writ of certiorari to review or supervise these proceedings on the grounds set forth in the petition and argued in this brief.

Respectfully submitted,

SAMUEL E. HIRSCH,
Attorney for Petitioner,
Lester Rothschild, Individually and Trading as Gen-O-Pak Company.